Supreme Court, U. S.
FILED
MAY 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 76-1452

LOCKEWILL, INC.,

Petitioner,

v.

ASSOCIATED DRY GOODS CORP., d/b/a STIX, BAER & FULLER, THE UNITED STATES SHOE CORPORATION and PAPPAGALLO, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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In this dispute over an alleged oral contract for the sale of women's shoes in a shop in Ladue, Missouri, involving an interpretation of Missouri law, where federal jurisdiction is based solely on diversity of citizenship, there is nothing to excite the attention of our nation's highest court.

The petition for certiorari should be denied.

QUESTIONS PRESENTED

In an effort to interest the Supreme Court of the United States in this otherwise mundane litigation, the petitioner has phrased its questions in a manner cleverly designed to suggest constitutional issues, where none exist.

1. It is not the case, as suggested by the petitioner, that the issues upon which the Court of Appeals acted in reversing the judgment of the District Court were not raised at

the time of trial. The Court of Appeals, in reversing the District Court, simply held that in light of all the evidence presented by the petitioner, a directed verdict should have been granted on respondents' motion because reasonable minds could not differ that respondents were entitled to judgment as a matter of law. Rule 50, Federal Rules of Civil Procedure, does not conflict with the Seventh Amendment to the Constitution of the United States.

2. The Court of Appeals correctly held the law of Missouri to be that a contract, indefinite in its duration, was terminable at the will of either party; that this general principle of law was modified only to the extent that a distributor who had invested money in good faith on the strength of an oral promise of a distributorship of indefinite duration, could be assured that the distributorship would continue long enough to permit the distributor an *opportunity* for recoupment of his investment. The issue is not, as suggested by petitioner, whether there was actual recoupment, but only whether there had been a sufficient *opportunity* for recoupment. The Court of Appeals examined this issue thoroughly and found that the petitioner was not entitled to a new trial on the issue of *opportunity*.

CONSTITUTIONAL PROVISIONS INVOLVED

There are no constitutional provisions involved in this action.

COUNTERSTATEMENT OF FACTS

In this counterstatement of facts, petitioner will sometimes be referred to by its corporate name "Lockewill", and respondents sometimes by their respective corporate names "U. S. Shoe" and "Pappagallo".

Petitioner's Statement of Facts is misleading. Respondents deem it important to distinguish those "facts" set forth in the petition for certiorari which are not based on

evidence in the record, from the facts as shown from the testimony and exhibits admitted in evidence, and to point out to the court where petitioner has engaged in flights of fancy:

1. On page 5 of the petition, Lockewill says that "in order to *induce* the independent owners to set up a Shop for Pappagallo in their city, the shops were granted exclusive licenses to sell Pappagallo shoes in their respective areas." (Emphasis added.) There is nothing in the record cited by Lockewill (Ap. R. 307-308) which talks about "inducement", nor in fact is there any fair inference of "inducement" from anything that is in the record. Indeed, the record is clear that far from there being an inducement, Williams (petitioner's president) sought out Pappagallo in the first place (Ap. R. 162).

2. In the last full paragraph of the petition, beginning at the bottom of page 5, Lockewill says that "in March 1965, W. Grant Williams, founder of petitioner, negotiated a verbal agreement on behalf of petitioner with Bandler (Pappagallo's former president) in New York, the terms of which are as follows: . . . ." Lockewill then proceeds to outline, in a neat package on the bottom of page 5 and the top of page 6 of its petition, the terms of the alleged agreement as though Williams and Bandler sat down together, negotiated and agreed upon a clear unambiguous oral agreement with consideration flowing from both sides, and all of the obligations of the parties clearly negotiated and spelled out. A reading of the transcript, nevertheless, reveals that there was no such neat package.

The entire summarization by Lockewill of supposed testimony is a deliberate distortion of the actual testimony, in an attempt to avoid the legal conclusion, which must be drawn from the fair reading of the testimony, that the contract between Lockewill and Pappagallo was terminable

at will. The actual nature of the vague, loose business methods used by Bandler and Williams is obvious from the transcript of Bandler's testimony about his arrangement with Williams about termination and duration:

> Mr. Cole [counsel for petitioner] . . . :
>
> Let me say it a different way. What was the duration of your arrangement with the independent shop owner?
>
> A. I understand what you're objecting to. With regard to the Williams, duration is a two-way street. They were told that as long as they maintained the standards we spoke about at the outset, they could continue. They also could quit any time they liked. Any time they weren't happy with the arrangement, all they had to do was take down the sign, forget about it. We won't sell them any more shoes.
>
> Further, if by my standards they violated the general concept, I'd tell them to take down the signs and they wouldn't get any more shoes. Probably illegal, but not fattening.
>
> So that they could quit any time they wanted, change the name of the store and carry ham sandwiches. At the same time, I'd assured them that it was my intention to serve up an attractive assortment, periodically, that would be acceptable to them but there again, if they weren't satisfied, they couldn't quit halfway, stay or go. That's the best answer I can give you with regard to duration. Not in terms of days, months and years. . . .
>
> Mr. Cole: . . .
>
> Essentially, as long as they met your requirements and performed in accordance with your standards, was it your understanding and agreement that you would continue to supply them with the shoes and observe this exclusive right that you have testified to?
>
> A. I'll stand on the answer I have given already.
>
> Q. What was the term of your agreement with Mr. Williams?

> A. As I have stated, the term was a two-way street. As far as Mr. Williams is concerned, he could quit any time. All he had to do was take down the sign, get rid of the inventory he had the best he could, and we just wouldn't sell him any more. He could quit any time. Open end as far as he was concerned. . . .
>
> (Ap. R. 309-310)

The absence of any agreement between Bandler and Williams about duration is exemplified by Williams's own testimony (Ap. R. 230, 232-233):

> Q. Now, in your conversations with Mr. Bandler, I think you said that you talked about opening the shop. Did you have any conversation about how long the shop would be in existence?
>
> A. Mr. Bandler said that as long as I performed to what he wanted me to do and as long as he performed what he had to do for me, that I could have The Shop For Pappagallo.
>
> * * * * *
>
> Q. And you had this conversation with Mr. Bandler. For how long did you say the contract was to last?
>
> * * * * *
>
> Q. Were there any years put is what I'm asking you, any time put on it?
>
> A. None.
>
> * * * * *
>
> Q. And there was neither a second nor a millenneum mentioned by either you or Mr. Bandler?
>
> A. No.

It is clear that there was no agreement about duration.

3. At the bottom of page 8 of the petition, Lockewill says that it made a total investment of $225,570, referring to Ap. R. 170. Reference to Ap. R. 170 will show that there is no such total mentioned; that the testimony of expenditures is not at all clear; but that the paid in capital was $103,570. Lockewill's attempt to inflate the apparent size of its capital investment is certainly not justified.

DECISIONS BELOW

The Court of Appeals, viewing the evidence in the light most favorable to petitioner and giving the petitioner the "benefit of all inferences favorable to it that were reasonably deducible from the evidence" (A. 3-4), said (A. 5-6):*

> As a result of that meeting, which was highly informal, Williams and Bandler entered into the contract involved in this case and under which Pappagallo and the corporate plaintiff performed for nearly nine years.
>
> * * * * *
>
> The agreement was silent as to its duration and nothing was said about the right of either side to terminate the arrangement either with or without notice or with or without cause. Moreover, it does not appear that either side convenanted to remain in business permanently or for any particular period of time.

Most importantly, the Court of Appeals said (A. 7):

> As far as the record shows, plaintiff has never ceased to operate its Shop for Pappagallo at the same location and under the same name, nor has it ever ceased to sell Pappagallo products. Plaintiff is not suing U. S. Shoe and Pappagallo for any breach of that portion of the contract which involved sales of goods by those defendants to plaintiffs. The position of the plaintiff is that when U. S. Shoe and Pappagallo permitted SBF to open Shops for Pappagallo in its stores, those defendants breached the exclusivity provision of plaintiff's distributorship contract.

The Court of Appeals found the law of Missouri to be that where the parties to a franchise, or exclusive agency, or distributorship agreement, which is silent as to duration, and which does not deal specifically with termination,

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* The opinion of the Court of Appeals is attached to Petitioner's Brief as an appendix. Reference to that opinion is, hereafter, simply "A. —".

begin to perform under the contract, the agreement is construed to be terminable at the will of either party. The Court of Appeals, nevertheless, found an exception in Missouri law: if it appears that the distributor has in good faith incurred expense, or devoted time and labor in setting up the distributorship, without having had a sufficient *opportunity* to recoup his investment, the franchisor or manufacturer will be required to compensate the distributor for the investment. In the case at bar, the Court of Appeals held that, as a matter of law, reasonable men could not differ on the proposition that by late 1973 and early 1974 such a reasonable period of time had been given the petitioner for the *opportunity* to recoup its investment, and that by that time (A. 12):

> . . . U. S. Shoe and Pappagallo had the right to terminate their contractual relations with plaintiff entirely, which they did not do, or to cancel the exclusivity feature of plaintiff's distributorship, which they did do when they permitted S.B.F. to open shops for Pappagallo in its stores.
>
> And, we are convinced that plaintiff suffered no legal wrong when U. S. Shoe and Pappagallo finally implemented a change in marketing policy which had evidently been in contemplation for some years.

REASONS FOR NOT GRANTING THE WRIT

1. There Is No Widespread Public Interest Involved in This Case. The Area of Distributorship Terminations Is Well Defined by Missouri Law and the Court of Appeals for the Eighth Circuit Correctly Applied That Law. There Was Ample Evidence in the Record to Support the Findings and Decision of the Court of Appeals That the Oral Contract Was Indefinite in Duration and in Fact Was Terminated. There Are No Constitutional Issues Involved in That Finding or Decision.

The Missouri law on the subject of contracts terminable at will is well settled. The Court of Appeals correctly

applied the law, and nothing in that law, nor its application, warrants review by the Supreme Court of the United States. See *Superior Concrete Accessories* v. *Kemper*, 284 S.W.2d 482 (Mo. 1955); *Want* v. *Century Supply Co.*, 508 S.W.2d 515 (Mo. App. 1974); *Red-E-Gas Co.* v. *Meadows*, 360 S.W.2d 236 (Mo. App. 1962); *Beebe* v. *Columbia Axle Co.*, 117 S.W.2d 624 (Mo. App. 1938); *Gibbs* v. *Bardahl Oil Co.*, 331 S.W.2d 614 (Mo. 1960); *Glover* v. *Henderson*, 25 S.W. 175 (Mo. 1894).

It is *not* true, as stated on page 13 of petitioner's brief, that "on appeal, for the first time, respondents asserted a new theory of defense, to-wit: that they had effectively terminated the contract without liability for the executory portion." The Court of Appeals held that the oral contract was one of indefinite duration and under Missouri law was terminable at the will of either party. Petitioner's own evidence demonstrated that the contract had in fact been terminated. This termination was subject only to the reasonable limitation of affording the petitioner an *opportunity* for recoupment. This did not change the basic proposition, urged by respondents in their pleadings and at the trial, that it was a contract terminable at will. See, for example, Defendants' Amended Answer, paragraph 25 (Ap. R. 37); Defendants' Motion for Directed Verdict, Count II, paragraph 5 (Ap. R. 101); Defendants' Motion for Judgment Notwithstanding the Verdict, paragraph 5 (Ap. R. 110); Defendants' Proposed Converse Verdict Director, paragraphs (b) and (e) (Ap. R. 116); Defendants' Additional Proposed Written Interrogatories (to the jury), paragraph 6(a) (Ap. R. 120); Defendants' statement to the District Judge (Ap. R. 443, last paragraph).

Since the Missouri law is that a contract indefinite in duration is terminable at will, subject only to the right of

the distributor to have an opportunity for recoupment, once the petitioner proved the existence of an oral contract of indefinite duration, it was up to the petitioner to prove that it had not had a reasonable opportunity for recoupment. It was the petitioner's burden to establish and prove the case within Missouri law. It failed to do so. It was not respondents' burden to anticipate petitioner's claims. Therefore, when the respondents made a motion for directed verdict, the District Court should have granted it. That is what the Court of Appeals held in reversing the District Court.*

Petitioner argues that *Duignan* v. *United States*, 274 U.S. 195, 47 S.Ct. 566, 71 L. ed. 996 (1927), and *Hormel* v. *Helvering*, 312 U.S. 552, 61 S.Ct. 719, 85 L. ed. 1037 (1941), support its view that the Court of Appeals should not have reversed the District Court and remanded the case for judgment in accordance with its opinion. Petitioner has misinterpreted both of these cases. In the *Duignan* case, for the first time, on appeal, the defendant challenged the equity jurisdiction of the court. In the *Hormel* case, involving whether certain trust income was taxable to the petitioner, the Court of Appeals *did* pass on questions not raised below and the Supreme Court upheld its right to do so.

Respondents' theory in this case has always been that there was no contract because the vague arrangement made by Williams and Bandler was indefinite in duration and thus terminable at will; it was void because it lacked

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* The cases cited by petitioner at pages 18-19 of its brief, *McGinnis Piano & Organ Co.* v. *Yamaha International Corp.*, 480 F.2d 474 (8th Cir. 1973), *Ag-Chem Equipment* v. *Hahn, Inc.*, 480 F.2d 482 (8th Cir. 1973), and *Clausen & Sons, Inc.* v. *Theo. Hamm Brewing*, 395 F.2d 388 (8th Cir. 1968), are inapposite. *McGinnis*, *Ag-Chem* and *Claussen* all concerned Minnesota law, not, as here, Missouri law.

mutuality of obligation; it was void because it was vague, indefinite, and uncertain; it was void under the Missouri Statute of Frauds. All the facts necessary for an adjudication on any of these grounds, including the facts on termination, were before the District Court at the time the respondents moved for a directed verdict and, for a judgment notwithstanding the verdict. Therefore, for petitioner to state that the respondents advanced a new theory of defense in the Court of Appeals for the first time, is not in accord with the record in this case.

Moreover, petitioner should not be "allowed a new trial because the issue of whether a contract has been terminated is a jury question even when the contract in question is terminable at will." (Petitioner's brief p. 16.) It is, of course, a jury question only if there's a disputed fact. When respondents started selling their shoes to S.B.F., that, as a matter of law, terminated the exclusivity feature of the petitioner's alleged contract. Petitioner knew about the termination. Williams, petitioner's president, testified that in the summer of 1973 he received a phone call from Pappagallo's president stating "they were going to put the shoes in Stix, Baer & Fuller". (Ap. R. 183) That, in fact, was a termination of the exclusivity feature of the contract.

Petitioner appears to argue in the alternative that even if respondents could have terminated the entire contract, they were without power to modify the contract unilaterally. The respondents did not "modify" the alleged contract. What the respondents did, according to the Court of Appeals, was to terminate any agreement concerning exclusivity. Of course, petitioner continued to market Pappagallo products and what remained was an ordinary commercial relationship, consisting of a series of executory contracts for the purchase and sale of shoes. This relationship still continues between the parties.

Where a contract is terminable at will, there is no continuing contract. Each order for women's shoes, accepted, becomes a completed contract. The arrangement, so long as it continues, remains merely a series of completed contracts of purchase and sale. *Campbell* v. *American Handle Co.*, 94 S.W. 815 (Mo. App. 1906).

Petitioner urges that its constitutional right to a jury trial has been abridged by the action of the Court of Appeals in reversing the District Court, and argues that the Court of Appeals should have remanded the case for a new trial.

This court answered that argument in *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 18 L. ed.2d 75, 87 S.Ct. 1072 (1967), by saying (18 L. ed.2d, p. 80):

> The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n. o. v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n. o. v. See *Baltimore & Carolina Line, Inc.* v. *Redman*, *supra*. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n. o. v. on appeal. Section 2106 of Title 28 provides that, "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

2. The Action of the Court of Appeals with Respect to the Matter of Damages Is of No Considerable Interest or Concern to the Public. The Petitioner Failed to Prove Damages Required by Missouri Law. It Cannot Now Complain Because of Its Own Failure of Proof. Whether a Distributor Had an Opportunity for Recoupment Can Be a Question of Law.

Petitioner argues that the holding of the Court of Appeals, that reasonable men could not differ that by early 1974 the time for the opportunity of petitioner to recoup its initial investment had expired, was erroneous. On page 18 of its brief, petitioner purportedly quotes "material facts in the record" which it alleges were overlooked by the Court of Appeals. Petitioner's quotation of "facts" is in error. There is absolutely no evidence that petitioner's initial investment was $225,570. As pointed out in this brief on page 5 in paragraph 3, petitioner's initial investment was about $100,000. The fact that some $125,000 in additional funds may have been expended by the petitioner over the years, as suggested on page 18 of petitioner's brief, does not mean that the $125,000 was an investment in the business, and the record (Ap. R. 170) does not so indicate. The Court of Appeals correctly interpreted the evidence (A. 6), and found that Williams had invested only about $100,000 in Lockewill, not $225,570.

But no matter what amount petitioner spent or invested in the beginning, certain facts remain uncontroverted: that petitioner was at the time of the trial, and still is, in the business of selling women's shoes and other accessory items in Ladue, Missouri; that at the time of trial petitioner did, and still does, purchase women's shoes from respondents, and that some of its initial capital investment must, of necessity, be allocated to its continuance in business.

All that the Court of Appeals held was that this was a contract terminable at will, and that the respondents' right

to terminate it was limited by an important proviso: that respondents would be required to compensate the petitioner for any initial capital expenditure which petitioner had made, but which it had not had the *opportunity* to recoup. This did not change the respondents' right to terminate. What the Court of Appeals held was that as a matter of law, nearly nine years of exclusive distributorship was enough to afford the petitioner the *opportunity* for that recoupment. The cases cited by petitioner on pages 18 and 19 of its brief do not hold differently.

CONCLUSION

The petition for certiorari should be denied: there is no issue of important public interest; there is no constitutional question; there is no federal question; and the Court of Appeals correctly applied Missouri law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari upon John J. Cole, attorney for petitioner, by depositing the same in the United States mail, postage prepaid by air mail, addressed to him at 611 Olive Street, Suite 1950, St. Louis, Missouri 63101, this 17 day of May, 1977; and I further certify that all parties required to be served have been served.

Attorney for Respondents